

Discipline and Freedom in the Academy

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There are two distinct accounts of academic freedom.¹ The first refers to professional ideals of university governance, the second to principles of constitutional law.

Viewed as an ideal of university governance, academic freedom is essential to the ongoing administration of institutions of higher education. The American concept of academic freedom began in the early years of the twentieth century. Its first great statement was in the 1915 Declaration of Principles of Academic Freedom by the American Association of University Professors (AAUP).² The president of the Association at that time was John Dewey. The principal drafters of the 1915 Declaration were the economist Edwin R. A. Seligman and the philosopher Arthur O. Lovejoy.³

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1. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEXAS L. REV. 1265 (1988); David M. Rabban, *Academic Freedom* in LEONARD W. LEVY & KENNETH L. KARST, EDS., *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 12-13 (New York: MacMillan Pub. Co. 1986).

2. The text is reproduced in full at the AAUP web site: 1915 Declaration of Principles on Academic Freedom and Academic Tenure, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm> (last visited Mar. 16, 2012).

³ On the authorship of the Declaration, see Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONT. PROBLEMS 3, 12-13 (1990).

For most private universities like Yale, the legal source of academic freedom lies in contractual provisions guaranteeing academic freedom. These provisions are typically interpreted by reference to the 1940 Statement on Principles of Academic Freedom and Tenure, which was co-drafted by the AAUP, and which is generally regarded as the authoritative text on academic freedom in the United States.⁴

The AAUP has heard and adjudicated complaints about violations of academic freedom since its founding in 1915, and it has developed a sophisticated caselaw regarding the scholarly ideal of academic freedom. Its decisions constitute a form of soft law that has been highly influential in academic and legal communities.⁵ The AAUP presently maintains a list of censored universities that it believes have violated fundamental principles of academic freedom.

The professional ideal of academic freedom has four distinct components.⁶ The first is freedom of research and publication, which affirms that scholars should be free to study and research and to publish the results of their research. The second is freedom of teaching, or, as it is sometimes called, freedom in the classroom. The third is freedom of “extramural” speech, which refers to the capacity of faculty to make public pronouncements as citizens about matters that are *unrelated* to their scholarly expertise. If I am a scholar of computer programming and if my university seeks to penalize me for public statements about the war in Iraq that have nothing to do with computer programming, my freedom of extramural speech is at stake. The fourth is freedom of “intramural” speech,

4. The 1940 Statement, which has been endorsed by more than 200 educational societies and groups, is also reproduced in full at the AAUP website: <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>. The website also contains a list of the Statement’s endorsers.

5. For an account of the “soft law” of the AAUP, see MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (Yale University Press 2009).

6. For a discussion, see *id.*

which refers to the capacity of faculty to discuss the internal governance of universities.

Professor Schauer is correct that the professional ideal of academic freedom is incompatible with the most basic principles of ordinary First Amendment rights.⁷ If I ask my colleagues what academic freedom means to them, they typically report that academic freedom consists of rights that are analogous to constitutional rights of freedom of expression. But this is not correct.

First Amendment rights ensure that persons can assert opinions without fear of penalty. That is why the Court has ruled that under the First Amendment there is no such thing as a false idea.⁸ The famous theorist Alexander Meiklejohn has summarized the point by observing that within the domain of the First Amendment there must be an “equality of status in the field of ideas.”⁹

This conclusion is incompatible with the professional ideal of academic freedom. Universities routinely and properly judge scholars on the quality of their ideas. Depending upon the merit of their scholarship, professors do or do not receive tenure; they are or are not hired; they do or do not receive financial support; and so on. Whereas First Amendment rights are constructed to safeguard a speaker’s ability to assert whatever ideas she wishes, academic freedom protects no such liberty.

Properly understood, academic freedom safeguards a scholar’s capacity competently to perform her scholarship. It seeks to ensure that faculty will not be penalized for their scholarship, except on grounds of incompetence or material malfeasance. And it also requires that the competence of scholarship must be evaluated by scholars rather than by lay persons. The 1915 Declaration is quite explicit that

7. See Frederick Schauer, *The Permutations of Academic Freedom*, 65 ARK. L. REV. 191 (2012).

8. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

9. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1965).

academic freedom is "not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession."

Academic freedom is thus compatible with a physicist being denied tenure because he is incompetent, so long as the question of incompetence is determined by competent physicists rather than by lay administrators. Whether or not a physicist is incompetent must be determined by the application of the disciplinary standards of physics.

At root, therefore, the professional ideal of academic freedom refers to the self-regulation of the academic profession. The basic idea is that professional scholars are experts who can distinguish competent from incompetent scholarship, whereas lay members of the public are incapable of making such judgments. To know whether evolution is good scholarship, one must ask a certified biologist, not a lay member of the public, and certainly not a theologian or a politician.

Academic freedom in its constitutional sense has an entirely different structure. As with most constitutional rights in the United States, constitutional academic freedom is triggered only by state action. It applies only against public universities or against actions by the state that apply to all universities. The professional academic freedom applies to all institutions of higher education, and it concerns university ideals of self-governance; by contrast constitutional academic freedom concerns limitations on state power. It constrains the state in its role as a public institution (like a state university) or in its role as a public lawmaker that regulates all universities, public and private. A constitutional claim against the state requires a constitutional reason why the state may not act in a particular way. That the state may violate the professional ideal of academic freedom is not, *prima facie*, such a constitutional reason.

What might such a reason be? The United States Supreme Court has, since the late 1950s, trumpeted the importance of the constitutional right of academic freedom.

But the Court's cases discussing academic freedom are incoherent. The doctrine, as one famous scholar put it, floats in the law, picking up decisions as a hull does barnacles.¹⁰

When I was younger, I believed that the paradigm case of constitutional academic freedom concerned the penalization of faculty at public universities in ways inconsistent with the mission of public universities. Because the mission of public universities, like the mission of all universities, is to expand and disseminate knowledge, and because expert knowledge is defined and constituted by disciplinary standards, university actions inconsistent with the professional ideal of academic freedom were likely to contradict the mission of public universities and hence to violate constitutional academic freedom.

But I now believe that this account is incomplete. It does not explain how constitutional academic freedom might constrain state decision-making in its role as a legislator. What would preclude a state from passing general legislation redefining the mission of institutions of higher education, whether public or private? Without an answer to this question, constitutional academic freedom stands without a ground.

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The purpose of the First Amendment is to protect the freedom of persons to participate in the formation of public opinion. This freedom is essential to democracy, because a democratic state is one in which government is responsive to public opinion. By safeguarding access to public-opinion formation, therefore, the First Amendment protects the democratic legitimacy of our government. I shall use the term "public discourse" to refer to the communicative acts deemed necessary for the free formation of public opinion.

Because all persons have an equal right to influence the creation of public opinion, the First Amendment

10. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 253 (1989).

requires that all ideas in public discourse be treated equally. The postulate of equality does not express the equality of ideas, but the equality of persons. Every person has an equal right to participate in public discourse and so to attempt to shape the contours of public opinion. The democratic legitimacy of the state inheres in the hope that our participation might alter public opinion in ways that will make government responsive to our views. Because democratic legitimation is ultimately subjective—because it inheres in what we each think about our government—First Amendment doctrine ultimately protects subjective rights.

If we ask why we join together to debate in public discourse, the answer is that we deliberate in order to decide what we should do. When we decide upon a course of action, whether it be to create a social security system or an educational system or a health care system, we do so by establishing organizations designed to implement our decisions. If we decide to create a social-security system, we create an organization that will hand out social-security checks. If we decide to instruct our children, we create institutions that dispense education.

What, then, is an organization? An organization is an assembly of persons and resources that is arranged so as to achieve a particular mission, whatever that mission may be: national defense (the armed forces), justice (courts), social-security checks (a social-security bureaucracy), or higher education (public universities). To achieve its goal, an organization must be able to manage the people and resources within its control. This means it must also be able to manage the speech of persons within its control.¹¹

The supervisor of a social-security office must be empowered to discipline an employee who instead of handing out social security checks decides to stand on his desk and recite poetry. The supervisor must also be

11. For a full discussion, see Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

empowered to discipline the employee who improperly says to clients, "You will not receive your check." This implies that state organizations must be able to regulate the speech of persons within their control in ways that are completely different from the ways in which the state can regulate public discourse. And it also implies that state organizations cannot penalize speech within their control *unless* it is necessary in order to advance their mission.

I used to believe that constitutional academic freedom could be explained in this way. I used to believe that constitutional academic freedom signified no more than that state universities regulating the speech of professors could not do so in ways that were inconsistent with their mission. If the mission of universities is to advance knowledge, then state universities can not regulate the speech of faculty in ways that were inconsistent with this mission, which is to say in ways that are inconsistent with the professional ideal of academic freedom.

A few years ago, however, I realized that this picture fails to explain why a state can not alter the mission of its universities. If academic freedom were truly a distinctive constitutional value, it must prevent the state from redefining the purpose of universities. It must explain why the state cannot issue certain kinds of general regulations that adversely affect private universities, where the managerial authority of the state is not at issue.

In *Grutter v. Bollinger*,¹² for example, the Supreme Court invoked the academic freedom of universities as a special concern of the First Amendment, and in so doing it conceived academic freedom as limiting the state's ability to regulate private universities. The organizational account I once had of academic freedom was relevant only to the internal management of public universities. It said nothing about the general regulatory powers of the state.

Many of you might now be hypothesizing that a constitutional right of academic freedom should derive directly from the First Amendment value of the

12. 539 U.S. 306 (2003).

marketplace of ideas. This value first appeared in Justice Holmes's famous dissent in *Abrams* in 1919,¹³ and it has ever since been associated with the goal of protecting the creation of knowledge. The Court has often associated the constitutional right of academic freedom with the value of the marketplace of ideas, and this might cause you to be skeptical about whether I have located any deep constitutional difficulty. You might think that state regulations that inhibit the marketplace of ideas *pro tanto* infringe on the First Amendment. Because universities are institutions that foster the marketplace of ideas, the First Amendment principle of the marketplace of ideas would limit the ability of the state to regulate private universities.

To analyze this claim, however, we need to be precise about the goal of universities. If we take the University of Arkansas as an example, we find that as a "flagship public research university" its goal is in part "to grow the state's knowledge-based economy and to address major issues confronting Arkansas and the world."¹⁴ Like all public universities, therefore, the University of Arkansas aspires to increase and distribute knowledge.

The difficulty is that a marketplace of ideas does not produce knowledge. I know that this claim is a little counter-intuitive. But think for a moment about the actual circumstances under which our society produces knowledge. Think about scientific journals like *Lancet* or *Nature*. The point of these journals is to advance knowledge, yet their editors emphatically do not operate according to the marketplace of ideas. They do not publish every manuscript that is sent to them, on a first-come-first-serve basis. Instead they publish only the articles they consider to be the best of their kind.

The point of the ideal of the marketplace of ideas is to prevent discrimination of this kind. The marketplace of ideas is designed precisely to eliminate content

13. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

14. Faculty Handbook, Office of the Provost and Vice Chancellor for Academic Affairs, University of Arkansas, <http://provost.uark.edu/72.php> (last visited Mar. 16, 2012).

discrimination. It is supposed to enshrine an equality in the field of ideas. Yet if the editors of scientific journals cannot separate trash from excellence, their journals cannot serve as a venue for the advancement of knowledge.

If we scrutinize the institutions which actually produce knowledge in modern societies, like universities, we find that none of them exemplify the marketplace of ideas. All such institutions apply the kinds of professional norms of competence that we see utilized in the context of scientific journals.

Put bluntly, if the marketplace of ideas requires that there be no such thing as a false idea, then the marketplace of ideas cannot ever acknowledge any such thing as a true idea. The marketplace of ideas requires an equality of status in the field of ideas, but the advancement of knowledge by contrast requires precisely that we distinguish better ideas from worse ideas. In the context of knowledge, especially in the context of the complex forms of expertise that are taught in universities, we require disciplinary norms to distinguish good ideas from bad ideas.

If this sounds odd to you, consider what happens when you go to your doctor. If your doctor tells you that you have a serious medical problem and gives you medical advice “X” to deal with the problem, and if you follow X and consequently suffer harm, you may be tempted to sue the doctor for malpractice for advice X. In such a suit, the doctor will not be permitted to construct a First Amendment defense to liability for X. The doctor will not be heard to say, as Holmes said in the context of inventing the marketplace of ideas in *Abrams*, that X “is an experiment, as all life is an experiment.” The doctor will not be able to assert that under the First Amendment there is no such thing as a false opinion.

To the contrary, the doctor will be liable if X fails relevant standards of medical competence. The law will expect the doctor to communicate to you medical knowledge that passes the test of medical practice. We expect no less of professors at a state’s flagship research

university. Otherwise the university can not aspire to grow a knowledge-based economy.

If we wish to advance society's interests in the production of knowledge, therefore, the marketplace of ideas is not a helpful ideal. This implies that constitutional academic freedom can not rest on the principle of the marketplace of ideas. It must instead rest on a different constitutional value, a value that concerns the production and distribution of knowledge. In recent work, I have called this value "democratic competence."¹⁵ Democratic competence must be distinguished from democratic legitimation, which protects the free formation of public opinion.

It is fascinating to note that there are strands of contemporary First Amendment doctrine that, when carefully parsed, seem to exemplify the value of democratic competence. The First Amendment can not serve the value of democratic competence within public discourse, because the primary goal of public discourse is the formation of public opinion, and *opinion* is distinct from *knowledge*. We protect the free formation of public opinion in order to maximize the possibility of democratic legitimation for all citizens.

We can therefore expect to observe First Amendment doctrine serving the value of democratic competence only in situations that are *outside* of public discourse. Consider again the medical hypothetical we have been discussing: If your doctor offers you incompetent advice X, you may sue the doctor for malpractice, and the doctor may not invoke the First Amendment as a defense. Your doctor will be held to applicable standards of professional care. But if your doctor goes on the Jay Leno show and advises X to the general public, and if in reliance on the doctor some member of the public P decides to follow X and is consequently injured, the doctor will be entitled to a First Amendment defense in a suit by P for malpractice.

15. ROBERT POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (Yale University Press 2012).

The difference lies in the fact that a doctor talking on the Jay Leno show is addressing the public, and is therefore constitutionally characterized as participating in public discourse. He is attempting to influence public opinion, and the state must be cautious about censoring his attempt based upon the disciplinary standards of the medical profession. Doctrinally speaking, the doctor's assertions will most likely be classified as opinions that can be neither true nor false.

By contrast, a doctor offering her patient the identical advice X is not constitutionally characterized as attempting to affect the formation of public opinion; she is instead understood to be practicing medicine. Because in this context X is communicated outside of public discourse, the law is free to hold the doctor to the standards of knowledge of the medical profession.

When the doctor addresses the general public, our constitutional commitment is to the constitutional value of democratic legitimation, and we protect that value by characterizing X as constitutionally protected opinion. The general rule in public discourse is caveat emptor. P can rely on expert advice communicated in public discourse only at his own risk. Within public discourse, the law will not underwrite or enforce claims to knowledge. It will instead transform disputed claims of knowledge into controversies about opinion.

Outside of public discourse, by contrast, the law is free to protect the communication of knowledge. And a First Amendment commitment to the distribution of that knowledge becomes apparent when the state seeks to compel the communication of false knowledge, or when the state seeks to prevent the communication of true knowledge. Thus when Nebraska recently enacted legislation requiring doctors to offer false opinions to patients seeking an abortion, a federal district court had no difficulty striking down the statute as inconsistent with the

First Amendment rights of doctors.¹⁶ Or when Congress in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹⁷ prohibited lawyers from advising clients that they had a right to incur debt in contemplation of bankruptcy, a right that clients in fact possessed, courts considering the question immediately realized that prohibiting the communication of true legal knowledge raised serious First Amendment concerns.¹⁸ Every court to consider this provision of the Bankruptcy Act intuited the presence of a First Amendment problem, even though the constitution would have no relevance to ordinary malpractice litigation in which lawyers might be compelled to speak, or might be prohibited from speaking, in ways that contravene accepted standards of legal practice.

Cases like these suggest that important strands of First Amendment doctrine are quite attuned to the distribution of knowledge outside the channels of public-opinion formation. This has important implications for our consideration of the constitutional value of academic freedom. It suggests that there is independent constitutional value to the production and distribution of knowledge. This value can sustain a coherent First Amendment jurisprudence of academic freedom. It is a jurisprudence that ultimately would protect universities as unique sites that specialize in the development and reproduction of the disciplinary standards that define and enable expert forms of knowledge. It would mean that any effort of the state to compromise the development and reproduction of such disciplinary standards would at least raise intelligible First Amendment questions.

16. *Planned Parenthood v. Heineman*, 724 F. Supp. 2d 1025, 1048 (D. Neb. 2010). *See also* *Planned Parenthood Minnesota, North Dakota, South Dakota v. Dugaard*, 799 F. Supp. 2d 1048 (D.S.D. 2011).

17. Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005, codified at 11 U.S.C. § 526(a)(4) (2011).

18. The provision was ultimately upheld by a creative reading of the statute that interpreted it to allow lawyers to disclose all advice that might otherwise be true and legitimate. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 n.5 (2010).

This is the account of constitutional academic freedom that I seek to develop in my most recent book.¹⁹ The account solves many of the puzzles that presently afflict judicial decisionmaking involving constitutional academic freedom.

To pick only one example, courts are presently deeply confused about whether the right of academic freedom attaches to universities as institutions or instead to faculty members as individuals. Many courts say that universities hold the academic-freedom rights, not individual professors. Thus if a professor sues her university alleging a violation of academic freedom, many courts might say that it is the academic freedom of the university, not that of the professor, which is at stake. Other courts, by contrast, hold the opposite view, that individual professors hold academic-freedom rights, not universities.

The analysis I am offering suggests that this whole debate is misguided. Academic freedom inheres neither in individual faculty nor in universities as institutions, but instead in the disciplinary standards that define and produce knowledge and that are nourished within properly functioning universities. If a university penalizes professors in ways that are inconsistent with the disciplinary standards that define knowledge, it is acting inconsistently with academic freedom. Similarly, if an individual faculty member acts in ways inconsistent with disciplinary standards, she does not merit the protection of academic freedom. Disciplinary standards are the locus of constitutional academic freedom because such standards create and propel new knowledge.

19. See POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM*, *supra* note 15.

